UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

LABOR PLUS, LLC, Respondent, and IATSE, LOCAL 720, Charging Party.	Case No. 28-CA-150723

MOTION TO DISMISS COMPLAINT AND NOTICE OF HEARING

Pursuant to Rule 102.24 of the Rules and Regulations of the National Labor Relations Board ("NLRB"), Respondent Labor Plus, LLC ("Respondent or "Labor Plus") hereby moves to dismiss the Complaint and Notice of Hearing ("Complaint") issued in the above captioned matter by the Regional Director for Region 28 of the National Labor Relations Board ("Region") in its entirety.

The bare bones, 5-page Complaint – including captions, signature blocks, and boilerplate about e-filing and answer requirements – should be dismissed because it fails to meet even the most minimal standards of notice pleading.[1] Essentially, the Complaint does nothing more than restate the Charging Party Union's allegations as facts.

Whatever the standard of pleading, such a threadbare Complaint fails. The Complaint is so bereft of critical and necessary facts that it fails to state a claim for relief. Indeed, it is so thoroughly inadequate that it fails to satisfy the most fundamental notions of fairness and due process. In addition, the Complaint is completely based on allegations from the Charging Party

[1] The Complaint is attached hereto as Exhibit A.

Union that has provided the Region with evidence that unequivocally contradicts the Complaint. Accordingly, it should be dismissed in its entirety.

I. BACKGROUND

On April 22, 2015 the Charging Party IATSE Local 720 ("Union") filed a Charge Against Employer against Labor Plus. *See* Charge Against Employer, No. 28-CA-150723, attached hereto as Exhibit B. The entire charge consisted of the allegation that:

> In the past six months the above-referenced employer has terminated all employees in response to a union organizing campaign.

On June 30, 2015, the Region issued a Complaint and Notice of Hearing in this matter. The Complaint is a mere seven paragraphs long and only contains factual allegations in paragraph 5, which is divided into two subparagraphs.[2] That paragraph reads in its entirety:

> 5 (a) About April 20, 2015 Respondent discharged its employees Collin Barnes, Johnathon Contini, Luke Cresson, Eric Fouts, John Gable, James Herlihy, Debbie Jensen-Miller, Timothy Karlsen, Heather Lewis, Hector Lugo, Josh Perrrlll, Brian Pomeroy, Bret Portzer, Christopher Portzer, Eric Shafter, William Stephenson, Doug Tate, Sr., Trent Utterback, David Weigant, and Kendall Zobrist.
>
> (b) Respondent engaged in the conduct described above in paragraph 5(a) because the named employees of Respondent formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities,

Subparagraph 5(a) essentially is a repetition of the union's charge that the employer terminated all employees, except that it replaces "all employees" with the employees' names. Subparagraph 5(b) does much the same thing, merely changing the union's "in response to a

[2] The other paragraphs in the Complaint contain information about when the charge was filed and served (¶ 1), jurisdictional allegations about the Respondent (¶ 2), allegations about the Union's status under the NLRA (¶ 3), identification of supervisors and agents at Respondent (¶ 4), and legal conclusions about the allegations in paragraph 5(a) (¶¶ 6-7)

union organizing campaign" to "because the named employees of Respondent formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities."

Thus, on its face, the Complaint is nothing more than a regurgitation of the union's factually unsupported and bare-bones charge. Respondent filed its Answer to the Complaint on July 14, 2015.

II. ARGUMENT

A. The Complaint's Bare and Conclusory Allegations Do Not State a Claim

The Complaint should be dismissed because it fails to provide the required factual allegations necessary to state a claim for relief under the Act. The NLRB's own rules require that "(t)he complaint shall contain . . . a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of the respondent's agents or other representatives by whom committed." NLRB Rules and Regulations § 102.15. Further, as the NLRB Case Handling Manual instructs, "[t]he allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met." NLRB Case Handling Manual § 10264.2.

The Complaint in this matter is a complete abdication of these rules and principles. The Complaint only makes one specific factual allegation -- that the employees listed in Paragraph 5(a) were discharged "about April 20, 2015." The Complaint is completely devoid of any factual allegations that would support the charges in the complaint. Under Board law, if the pleadings are insufficient to state a claim for relief, the Complaint should be dismissed. *See Huyck Corp.,*

Formex Co. Div., 160 N.L.R.B. 835 (1966) (dismissing complaint as it did not allege sufficient basis that the Respondent had interfered with election).

Given the complete insufficiency of the pleading, it is not difficult to identify the many factual details that it lacks. Among the critical missing factual details: information about the employees' purported Union activities, Respondent's knowledge of such activities, anything to suggest that there was any anti-Union motivation on the part of the Labor Plus. Without such essential factual information, the Complaint fails as a matter of law.

B. The Complaint Fails to Provide Labor Plus with Due Process

Fundamental principles of due process also require dismissal, as the Complaint fails to provide fair notice to Labor Plus of the allegations it must defend at the hearing. As a general rule, notice and an opportunity for a hearing are essential to due process in proceedings of an administrative character affecting a person's liberty or property, where the agency performs adjudicatory functions, acts in a judicial or quasi-judicial capacity, or takes action on the basis of adjudicative facts. *See, e.g., Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Gonzales v. U.S.*, 348 U.S. 407 (1955). The notice must be adequate and reasonably calculated to inform the parties of administrative proceedings which may directly and adversely affect their legally protected interests, the claims of opposing parties, and the issues in controversy. *See, e.g., Huntley v. North Carolina State Bd. of Ed.*, 493 F.2d 1016 (4th Cir. 1974); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971).

"Fundamental to our legal system is the requirement that, before a judgment or enforceable order is entered against a person, some form of pleading, giving notice of the charges, must be served upon that person. Unfair labor practice proceedings are no exception to that rule." *NLRB v. H.P. Townsend Mfg. Co.*, 101 F.3d 292, 294 (2nd Cir. 1996). "Due process

requires that persons charged with unlawful conduct be given prior notice of the charges and an opportunity to be heard in defense before the government can take enforcement action." *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1073 (1st Cir. 1981), abrogated on other grounds, *NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775, 786 n.7 (1990).

It is absolutely critical for the Complaint in an unfair labor practice case to provide fair "notice of the charges and of a hearing to determine them." *H.P. Townsend Mfg. Co.*, 101 F.3d at 294 (citations omitted). That notice "must inform the respondent of the acts forming the basis of the complaint." *Id.* (quoting *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990)). Further, the Administrative Procedure Act provides that "(p)ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554(b)(3).

A NLRB complaint, "much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing." *H.P. Townsend Mfg. Co.*, 101 F.3d at 295 (quoting *Douds v. Int'l Longshoremen's Ass'n*, 241 F.2d 278, 283 (2nd Cir. 1957)). The "(f)ailure to clearly define the issues and advise an employer charged with a violation . . . of the specific complaint he must meet and provide a full hearing upon the issue presented is . . . to deny procedural due process of law." *Soule Glass & Glazing Co.*, 652 F.2d at 1074 (quoting *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967)).

Indeed, the due process issues are even more pronounced in an NLRB proceeding because the NLRB keeps its investigation confidential. During the investigatory stage, the Region divulges very little information and the charged party has no right to view the evidence against it. NLRB Rules and Regulations do not provide for any pre-hearing discovery in an

unfair labor practice proceeding by an employer. At trial, the charged party does not even have the benefit of the affidavits of witnesses providing evidence until after those witnesses have testified. In this context, a properly drafted complaint is absolutely critical as it is the only document from which the employer can possibly prepare a defense.

If the Region is permitted to proceed to hearing based on its factually barren, conclusory Complaint, Labor Plus will be deprived of any information necessary to prepare a meaningful defense. Without adequate notice or the ability to conduct discovery prior to the hearing, Labor Plus will essentially face a trial by ambush. This practice has been criticized by the U.S. Courts of Appeal. *See, e.g., Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 n.60 (D.C. Cir. 1983) ("[E]ach party is entitled to know what is being tried, or at least to the means to find out. Notice remains a first-reader element of procedural due process, and trial by ambush is no[t] . . . favored . . . .") (quoting *Jimenez v. Tuna Vessel "Granada"*, 652 F.2d 415, 420 (5th Cir. 1981), *cert. denied*, 467 U.S. 1241 (1984)).

As discussed in Section A above, the Complaint simply contains no factual allegations and fails utterly to satisfy the requirements of due process. With a Complaint containing no more than legal conclusions and bald assertions, Labor Plus has not received adequate notice as to what issues will be considered in the case at the hearing and will not have the opportunity to fully litigate the issues at the hearing. In such circumstances, the Board should dismiss those claims. *See, e.g., Pure Chem. Corp.*, 192 N.L.R.B. 681, 682 (1971).

C. The Complaint Should be Dismissed Due to the Union's Inconsistent and Contradictory Allegations

The failure of the Complaint to allege sufficient facts is sufficient in itself for dismissal, but in the instant case, there is much more. Here, the Union has contradicted the alleged foundation for the Complaint in charges filed with the Region as well as in evidence and

argument offered in other proceedings before the Region. These other Union allegations are inconsistent and irreconcilable with the position taken in the Complaint.

The conclusory statement made by the Complaint is that the listed employees were terminated by the employer, essentially accepting the Union's allegation to that effect. However, the Union contradicted the allegations in its charge and the Complaint in the representation proceeding that underlies the charge.[3] In the course of the hearing in that matter, which held on May 27, 2015, 35 days after the charge at issue in this case, the Union repeatedly and vociferously argued that the employees had not been terminated and remained employees of Labor Plus,[4] *See* Labor Plus, LLC, May 27, 2015 Hearing Transcript, Case No. 28-RC-150168 ("Tr."), attached hereto as Exhibit C. In other words, over a month after alleging in the charge in this case that the employees had been terminated, it directly and completely undermined that charge.

> So the election is May 2, Saturday. So the question does anything change? Well we know that none of them quit by – I said I resign. ***None of them were fired. None of them terminated.*** None of them abandoned their employment. So they're all still employed.

Tr. at 229:13 (Oral Argument of D. Rosenfeld) (emphasis added); see also Hearing Tr. 234:20 ("they weren't fired, they weren't terminated"); Tr. 112:7 ("Madam Hearing Officer, they were never terminated. ... They didn't terminate them.")

---

[3] Respondent requests that the Board take judicial notice of the representation proceeding and the new charge filed by the Union. It is the long-standing "practice of the Board to take judicial notice of its own records and proceedings." *Abercrombie, J. S., Co.*, 83 NLRB 524, 1-525 (1949) (taking judicial notice of a related representation proceeding). As the Union's June 26, 2015 letter explains the newly-filed charge, Respondent also asks the Board to take judicial notice of the letter.

[4] The petitioned-for unit was "All full-time and regular on-call stagehand employees in the Wynn Show Stoppers Theater, excluding all other employees, including wardrobe, hair, makeup employees, guards and supervisors under the Act" and consisted of the very same employees named in the Complaint, with the exception of one. Eric Myers was among the list of employees who voted in the May 2 election who is not among the employees listed in Paragraph 5(a) of the Complaint, indicating that, even by the Union and the Region's reckoning, that not all of employees were discharged

In its post-hearing brief, the Union continued to sing this diametrically changed tune and claimed that the employees in question were still employed by Labor Plus

> On the date of May 2, indisputably employees of the employer worked at the Show Stoppers show at the Wynn. ... Whether the remaining employees who voted were employed on that date doesn't affect the outcome of this case. Nonetheless, the Petitioner maintains that they remained employees even though the Wynn may have *subsequent* to May 2 determined that it would pay them. Plainly on May 2 they were working at the show.

Post-Hearing Brief of Petitioner at 1, attached hereto as Exhibit D.

This same position is also reflected in the Union's response to Labor Plus' Motion to Dismiss the representation petition. *See also* IATSE Local 720's Opposition to Labor Plus, LLC's Motion to Dismiss at 1, attached hereto as Exhibit E ("On the date of the election, May 2nd, Labor Plus remained the employer."). These arguments, which cannot be reconciled with the Union's prior charge on which the Complaint is based, require dismissal of the complaint.

The Union's arguments illustrate yet another point warranting dismissal – the Union has maintained that the employees have been and continue to be employed by alleged joint employers. In fact, on July 10, 2015 the Union filed a new charge with Region 28 alleging that Labor Plus:

> refused and/or failed to bargain in good faith, and refused and/or failed to provide information pursuant to an information request. Labor Plus, LLC and the Wynn Las Vegas, LLC are joint employers and the Wynn Las Vegas, LLC is a perfectly clear successor employers [*sic*].

Charge Against Employer No. 28-CA-155947, attached hereto as Exhibit F.

The Union's subsequent charge is based on a letter sent on June 26, 2015 to both Labor Plus and the Wynn which affirms the Union's understanding that the employees still remain employed at the Wynn. The letter states:

> We recognize that Labor Plus contends that it no longer employs employees at the theater. It is the position of Local 720 that Labor Plus and Wynn Casino were a joint employer and **are the joint employer** of those employees. Wynn is also the single employer at this time.

June 26, 2015 Letter from Kristina Hillman (Weinberg, Roger & Rosenfeld) to Dianne LaRocca (DLA Piper) and Monica Coakley (Wynn Casino), attached hereto as Exhibit G. The letter goes onto request work schedules and payroll records from "May 1, 2015 to the present," demonstrating clearly that the Union was aware that the employees had not been terminated at the time of the letter. The Union's charge and letter necessarily means the Union's position is that the employees have not been terminated, a position inconsistent with the allegations of the Complaint.

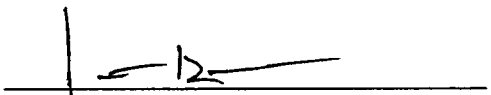
Because the Complaint is premised on factual allegations that the Charging Party itself has contradicted and undermined before the Board, the Complaint should be dismissed.

III. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety.

Respectfully Submitted,

DLA Piper LLP (US)



Jonathan Batten
500 Eighth Street, NW
Washington, D.C. 20004
202.799.4329
jonathan.batten@dlapiper.com

Attorneys for Respondent Labor Plus, LLC

Date: August 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Dismiss Complaint and Notice of Hearing was filed electronically and sent via e-mail to the following:

Cornele A. Overstreet
Regional Director
National Labor Relations Board, Region 28
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

Caren P. Sencer
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
csencer@unioncounsel.net

An Employee of DLA Piper

8/2/15
Date